FEB 29 1996
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No. 95-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

A.A. & M. CARTING SERVICE, INC.; FARMINGDALE CARTING, INC.; NATALE PEPE WASTE CORP.; PGS CARTING CO., INC.; JOSEPH S. CELANO; MARIANNE CELANO; JC INDUSTRIES, INC.; C.B.S. RUBBISH CO., INC.; FARMINGDALE INDUSTRIAL PARK ASSOCIATION; MINERSFUEL COMPANY, INC.; and RESOURCES CONSERVATION CORP.,

Petitioners,

vs.

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as COMMERCIAL WASTE COLLECTING AND RECYCLING DISTRICT; TOWN BOARD OF THE TOWN OF BABYLON; RICHARD H. SCHAFFER; and BABYLON SOURCE SEPARATION COMMERCIAL, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In 1994, the Town of Babylon undertook to form a Commercial Garbage District for the purpose of collecting solid waste within the Town, as they had already been performing this same function for its residential properties for

many years. Babylon's taking on these responsibilities, and potential liabilities,[1] is quite unremarkable. Countless local governments have acted in a similar manner for almost one hundred years. Pet. App. 23a.

Petitioners seek review from this Court on the claim that the court below ignored this Court's teachings in two recent Commerce Clause decisions. *See West Lynn Creamery, Inc. v. Healy,* 114 S. Ct. 2205 (1994); *C & A Carbone, Inc. v. Town of Clarkstown,* 114 S. Ct. 1677 (1994). Furthermore, Petitioners claim that the court below incorrectly relied on two venerable, but according to Petitioners, obsolete, decisions of this Court. *See California Reduction Co. v. Sanitary Reduction Works,* 199 U.S. 306 (1905); *Gardner v. Michigan,* 199 U.S. 325 (1905).

Lastly, Petitioners state that this case raises the same basic issue as that in *SSC Corp. v. Town of Smithtown,* 66 F.3d 502 (2d Cir. 1995), *cert. denied,* 64 U.S.L.W. 3551 (U.S. Feb. 20, 1996). This Court's recent refusal to grant certiorari in *SSC Corp.* should effectively render analogous arguments moot.[2]

It is respectfully submitted that this Court did not intend *Carbone* to be read as an obituary for traditional municipal rights and responsibilities. The court below analyzed this threshold issue of Babylon's taking over the collection of the waste, and found that it passed Commerce Clause scrutiny as set forth by this Court in *Carbone.* Pet. App. 17a.–44a.

For purposes of maximizing efficiency of operations and to realize the greatest cost savings for its citizens, the Town of Babylon chose to delegate the **actual** collection to a private company. BSSCI was selected pursuant to a vigorous national

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[1] *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1980).

[2] This Court's denial of certiorari in *SSC Corp.* cannot be understated, as both cases arose out of the same District Court, were heard by the same panel of judges of the Second Circuit, and both cases were decided on the same day by the court below. The relevant issues and facts of both the case at bar and *SSC Corp.* are remarkably similar.

bid, through a Request for Proposal process as proscribed in New York Law. *See* N.Y. General Municipal Law § 120-w (McKinney's, 1986). Pet. App. 34a. Some of the Petitioners participated in the bidding process, but were unsuccessful.

The Town drafted its contract with BSSCI to encourage them to bring the **Town's** waste to the **Town's** incinerator, which had disposal capacity that was being paid for whether used or not. Both the delegation of the collection to BSSCI, and the offering of free disposal at the Town's facility to BSSCI, were analyzed logically by the court below as corollary issues and found to be lawful, in harmony with this Court's Commerce Clause jurisprudence.

Contrary to Petitioners' position, the conclusion reached by the court below was not inconsistent with *West Lynn Creamery.* Distinguishable from the tax-subsidy twin statutes therein, with their push-pull effect, the instant case involved a threshold issue, the right of the Town to take over the collection of garbage, with corollary issues flowing therefrom.

WHY THE WRIT SHOULD BE DENIED

BABYLON DOES NOT VIOLATE *CARBONE*

Upon careful analysis, the court below properly found that *Carbone* did not fashion a new limitation on local governmental authority to provide basic sanitation services to local residents and businesses. Pet. App. 3a. The court below stated that:

> [s]uch a limitation, to borrow the words of the Supreme Court, "would interfere significantly with a State's ability to structure relations exclusively with its own citizens. It would also threaten the future fashioning of effective and creative programs for solving local problems and distributing governmental largesse. A healthy regard for federalism and good government renders us reluctant to risk these results."

Pet. App. 3a, 4a, *quoting Reeves, Inc. v. Stake,* 447 U.S. 429, 441 (1980) (citation omitted).

An important distinction that compelled the Second Circuit's decision was the manner in which the respective municipalities participated in their overall waste management program. While the Town of Clarkstown in *Carbone* was operating outside of the traditional parameters of action, not taking on the responsibility for the collection of the solid waste, but merely directing waste to its favored facility, the Town of Babylon in the instant case has in fact taken on this responsibility, albeit by the use of an agent. Pet. App. 19a–20a. Clearly, the Second Circuit panel that rendered the unanimous opinion has the ability to recognize, and distinguish, those ordinances which utilize flow control schemes, and therefore discriminate against interstate commerce. *See SSC Corp.*, 66 F.3d 502.

Had this Court intended to extirpate the vitality of the 1905 decisions relied upon by the court below, traditionally this Court would have done so explicitly. Pet. App. 43a. Furthermore, the instant Petitioners have already conceded the constitutionality of the Town's plan **but for** its utilization of BSSCI as the Town's agent for the solid waste collection. Counsel of record for Petitioners, who was also counsel of record for Petitioners C & A Carbone, Inc. in the *Carbone* case before this Court, stated at oral argument before the District Court on December 16, 1994, that:

> under the Carbone decision there is no question that if the Town itself actually wanted to take over the trash collection the same way it does police protection, fire protection and so on, if it were actually willing to go out and acquire the vehicles and have its own drivers, increase the general taxes to pay for it, they can do that and **my clients would not have a claim under the commerce clause.** (emphasis added).

Resp. App. A-3.[3]

Notwithstanding the foregoing, Petitioners now argue that the instant plan is a carbon copy of what this Court rejected in *Carbone,* stating that the Court below erred in upholding a plan that repeats the prohibited effect and design of the *Carbone* ordinance. Pet. Brief at 10. However, it has been Respondent's position throughout this action that, contrary to *Carbone,* the threshold issue here is a determination of a municipality's right, pursuant to its police power, to take over the **collection** of solid waste generated **within its borders**. The court below properly held that this right is well recognized, Pet. App. 20a–21a, and that the Town was simply following "the example set by countless other local governments by hiring a private contractor to collect commercial garbage on its behalf." Pet. App. 23a.

In attempting to wade through the "quagmire" that our negative Commerce Clause jurisprudence has become, it is significant to note that Justice Scalia, in a concurring opinion in *West Lynn Creamery,* stated "[t]he object should be, however, to produce a clear rule that honors the holdings of our past decisions but declines to extend the rationale that produced those decisions any further." *West Lynn Creamery,* 114 S. Ct. at 2220, (Scalia, J., concurring) (citation omitted).

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[3] Clearly, the Town's utilization of an agent does not alter the analysis, as courts that have been required to rule on this issue have stated that:

> [T]he accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. **It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract. . . .**

Weyerhaeuser v. Pierce City, 873 P.2d 498, 506 (Wash. 1994) (emphasis added) (quoting *Davis v. Santa Ana,* 239 P.2d 656 (Cal. Ct. App. 1952)); *accord Peninsula Sanitation v. City of Manistique,* 526 N.W.2d 607 (Mich. Ct. App. 1994).

Petitioners seek to have this Court agree that the court below failed to uphold *Carbone;* however, the Court below simply followed Justice Scalia's admonition, and refused to extend the fact specific rationale that compelled this Court's decision in *Carbone* any further.

APPLICATION OF *WEST LYNN CREAMERY*'S TEACHINGS IS INAPPROPRIATE TO THE INSTANT CASE

Petitioner incorrectly asserts that *West Lynn Creamery* precluded the Court below from analyzing Babylon's waste management program components separately. The same arguments that are raised by Petitioners to this Court were rejected by the Second Circuit, where the Court stated that "[w]e are not persuaded by the analogy to *West Lynn Creamery.*" Pet. App. 31a.

It is apparent that this Court's analysis in *West Lynn Creamery* was not intended to be relevant to Babylon. In the instant case, the components that the Second Circuit analyzed were the Town's granting of an exclusive license for the collection of the solid waste within the District, the contract for the disposal of the waste, and the assessment of benefit taxes against the commercial generators of the waste. The court below held that Babylon's overall solid waste management scheme did not violate the Commerce Clause, because there was not discrimination against interstate commerce. Pet. App. 3a.

The Town's decision to undertake the responsibility of solid waste collection themselves, through the utilization of an agent, was based in large part upon the Town's finding that substantial money would be saved by the commercial generators of the waste versus what they had previously been paying for such services. Pet. App. 10a.

Nevertheless, *West Lynn Creamery* is significant in one respect. In that decision, Chief Justice Rehnquist warned against allowing the dormant Commerce Clause to cause the stifling of innovation, when he stated:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

West Lynn Creamery, 114 S. Ct. at 2223 (Rehnquist, J., dissenting) (quoting *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Similar sentiments were echoed by Judge Cabranes in the Second Circuit's decision in *SSC Corp.,* where he stated that, as a result of landfills reaching their bursting point, and with environmental regulations burgeoning, "local governments have been forced to make significant investments and become more innovative in safely and legally disposing of trash." *SSC Corp.,* 66 F.3d at 505.

Babylon is that innovative municipality that has engineered efforts at coping with a serious problem for most of the country; dealing with the responsibility of solid waste management in an era where solutions are disappearing while the waste problem is mounting. For this Court to invalidate that which Babylon has created would fashion an enormous disincentive, even greater than those which already exist, which would discourage municipalities from even contemplating how to address these serious waste disposal problems.

THE ISSUE OF IRREPARABLE HARM IS NOT DISPOSITIVE TO A RESOLUTION OF THIS ACTION

Finally, Petitioners seek this Court's review as to whether irreparable harm exists as an absolute in **any** claim of a deprivation of a constitutional right. The District Court, after extensive briefing and hearing both sides at oral argument on three separate sessions regarding this issue, found, that no irreparable harm was involved. Rather, the District Court held,

and the Second Circuit found, that the record below supported the finding that "[Petitioners'] alleged injuries would be entirely financial — and therefore remediable by an award of money damages." Pet. App. 45a.

Despite having its argument rejected by both the District Court and the Court of Appeals, Petitioners posit that a deprivation of any constitutional right constitutes irreparable harm. This Court must not grant certiorari based upon this argument, as a resolution of the issue of what constitutes irreparable harm does nothing to further Petitioners claims, simply because the Second Circuit found that no likelihood of success could be demonstrated by Petitioners. Pet. App. 46a.

CONCLUSION

By the foregoing, the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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A.A.& M. CARTING SERVICE, INC., et al.,	:	CV 94 5571
Plaintiffs,	:	U.S. Courthouse Uniondale, New York
v.	:	TRANSCRIPT OF MOTION
TOWN OF BABYLON, et al.,	:	December 16, 1994
Defendants.	:	2:00 o'clock p.m.

---------- X

BEFORE:

HONORABLE THOMAS C. PLATT, Chief U.S.D.J.

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* * *

business back again.

The simple fact is once they lose the customers, the business is going to be completely destroyed.

And under Janmort in particular, the destruction of a business does constitute irreparable injury.

THE COURT: Well, Miss Christian, supposing I am the supervisor of the Town of Babylon and I've got a bunch of yea sayers on my board and they will do whatever I want and I suddenly get the idea that I can save my residents a lot of money if I turn this whole garbage collection business into a municipal function. And I say, that's the end, boys. No more garbage to be picked up. The town is going to pick it up and dispose of it.

This will destroy all those carters' business, according to you.

MS. CHRISTIAN: Your Honor, under the Carbone decision –

THE COURT: No. Wait a second. Right, it will destroy all their business.

MS. CHRISTIAN: If the town itself decided to acquire the vehicles and drivers and pick up the trash itself, yes, it would destroy their business.

THE COURT: And I get my — I pay for all these trucks what have you that I buy at a discount now because I am running my business, is there something illegal about that?

MS. CHRISTIAN: Your Honor, in that situation I think it's possible that there might be a claim under the taking clause. There might be a claim under the —

THE COURT: Under the taking clause or under some sort of custom and usage?

Why may I not do this for my taxpayers who are madder than hell because I will be raising their property taxes every year?

MS. CHRISTIAN: Your Honor, if I may, from a commerce clause then, under the Carbone decision there is no question that if the town itself actually wanted to take over the trash collection the same way it does police protection, fire protection and so on, if it were actually willing to go out and acquire the vehicles and have its own drivers, increase the general taxes to pay for it, they can do that and my clients would not have a claim under the commerce clause.

Now I am simply holding open the possibility, which I have not researched because it's not the facts in this case, that there might be some claim under the taking clause of the original contract, but certainly that would not be unconstitutional under the commerce clause.

THE COURT: You're saying I may do it in that fashion, but I may not do it by contract and what you call an at or all type tax.

MS. CHRISTIAN: That's exactly what Carbone says, your Honor. The only avenue that the Carbone decision, as we know it, the only way that the town can escape commerce clause restriction is if it genuinely is willing to take on the burden of trash collection.

And that includes getting the vehicles, getting the drivers, and most important, politically making the decision to raise the general taxes to pay for it.

If they're willing to do all that, then they are simply not under the commerce clause anymore.

The town here has not been willing to do that. They're trying to come up with some sort of system to get around Carbone, but they are not willing to go as far as taking the one step that Carbone says that they could take and that is really do this as a municipal function. Under Carbone that is the only door that's been left open and they simply have not walked through it.

THE COURT: All right.

MR. AMOROSO: Good afternoon, your Honor. My name is Frank Amoroso and I am here on behalf of the town defendant.

I think the initial point I would like to make is that given the severity of the relief requested here,

* * *